In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-491

SIMON BRACH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-492

ZALI FRIED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. App.) is reported at 464 F. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1972. Mr. Justice Marshall extended the time

for filing the petitions for writs of certiorari to September 23, 1972, and on that date the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the conviction of petitioner Fried for aiding and abetting the sale of stolen merchandise was proper.

2. Whether petitioner Fried's conviction for possession of stolen goods under 18 U.S.C. 659 is supported by the evidence.

3. Whether the admission of evidence of a co-defendant's extra-judicial statement that he knew petitioner Brach constituted reversible error.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners Fried and Brach were convicted of having possessed and then sold stolen property in violation of 18 U.S.C. 659 and 2315 respectively.[1]

With respect to their convictions under 18 U.S.C. 659, both petitioners were sentenced to three years' imprisonment and petitioner Fried was fined $5000. With respect to their convictions under 18 U.S.C. 2315, petitioner Fried was placed on two years' probation and petitioner Brach on four years' probation. The court of appeals affirmed (Pets. App.).

The evidence adduced at trial showed that on October

[1] The jury was unable to agree on counts involving co-defendants Ishak Fried, petitioner Fried's husband, and one Aaron Schatten. Schatten subsequently pleaded guilty to a violation of 18 U.S.C. 659.

22 and 23, 1970, some 589 cartons, each containing two units of Japanese stereos, were stolen from Pier 21 in Brooklyn, New York (A. 258-269, 339).[2] Thereafter, eighty-five stereo units were seized by law enforcement officers from a New York City retailer, Joseph Levy, twenty-two from a Philadelphia wholesaler, William Hendler, and six units from customers of a Shamokin, Pennsylvania wholesaler, Carl Beddo (A. 494-509, 512, 426-429, 487-492). Most of the stereos seized bore serial numbers matching those of the units stolen from Pier 21 (A. 350, 454-456, 489-492).

The government's evidence further showed that petitioner Fried offered Hendler a quantity of the stereo units at a price well below the normal selling price for the units (A. 206-208). Hendler thereafter received thirty stereos, unaccompanied by a bill or invoice, in cartons bearing the name of a fictitious company (A. 208-215, 530-532). This transaction was the basis for petitioner Fried's conviction under 18 U.S.C. 659.

Similarly, petitioner Fried's husband sold Levy a number of stereo units for less than the market price (A. 26). One hundred stereos were delivered to Levy's business by a New York policeman who worked part-time for petitioner Brach, Mrs. Fried's son (A. 26-27, 158-165). At the time of the delivery, Levy signed a receipt at Brach's request which Brach retained. No invoice or bill, however, was ever received by Levy (A. 29-34).

Carl Beddo purchased a small quantity of stereos

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[2] "A." refers to the Joint Appendix for Appellants filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

from the Fried company on November 2, 1970. The units were purchased from another of petitioner Fried's sons and were transferred from a truck parked near the Fried firm to Beddo's car (A. 469-473).

A vice-president of North American Foreign Trading Corporation, the exclusive importers of the brand of stereos involved here, testified that North American did not sell any stereos to the Frieds during the months in question (A. 324). He further testified that none had ever been sold directly to the Frieds, Brach, Hendler or Beddo (A. 324, 647, 656).

ARGUMENT

1. Petitioner Fried contends that her conviction under 18 U.S.C. 2315 was improperly based on a charge that she had aided and abetted the sale of the stolen stereos to Levy. She asserts that the evidence was insufficient to support the charge and that the decision below improperly extended this Court's decision in *Nye & Nissen* v. *United States,* 336 U.S. 613. As the Court stated in that case: "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by action to make it succeed.' L. Hand, J., in *United States* v. *Peoni,* 100 F. 2d 401, 402." 336 U.S. at 619. The evidence showed that petitioner Fried participated in the management and control of the business and actively solicited the sale of the stolen stereos to Hendler well below the normal selling price of the units, that one of her sons sold stolen stereo units to Beddo and that her husband had sold some of the

units to Levy. Under these circumstances, the application of *Nye & Nissen* was proper. The jury, which was properly instructed on aiding and abetting,[3] could conclude from the evidence that petitioner Fried had associated herself with the venture and had sought by her actions to make it succeed. See *United States* v. *Callahan,* 439 F. 2d 852, 861-862 (C.A. 2), certiorari denied, 404 U.S. 826.

2. Petitioner Fried also contends that there was insufficient evidence to support her conviction under 18 U.S.C. 659 for possession of the stereos knowing them to have been stolen. That petitioner Fried knew the stereo units were stolen, however, is supported by the evidence showing that she not only arranged for a sale of some of the stolen stereos at an unusually low price, but also was associated with the scheme to sell the entire lot of the units. By soliciting the sale to Hendler of the stolen units, which were subsequently delivered, petitioner Fried exercised sufficient dominion and control over the units to be deemed to be in constructive possession of them. See, *e.g., United States* v. *Cousins,* 427 F. 2d 382 (C.A. 9); *United States* v. *Casalinuovo,* 350 F. 2d 207 (C.A. 2). Contrary to petitioner Fried's assertion, the decisions in *United States* v. *Wainer,* 170 F. 2d 603 (C.A. 7), and *Embree* v. *United States,* 320

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[3] The district court instructed the jury as to the acts necessary for petitioner to be found guilty as an aider and abettor as follows (A. 740):

> In other words, anyone who shares in the criminal intent of the principal and is willfully associated with the venture in a way that by his action he will fully participate or assist in bringing about the ultimate result is, under this section, in the same position as a principal.

F. 2d 666 (C.A. 9), are not in conflict with the decision below. In *Wainer*, the evidence showed only that the defendant arranged for a sale of stolen goods from one person to another. There was no evidence that the defendant had any other dealings with the goods. Likewise, in *Embree*, the only damaging evidence was that the defendant stated to another that a third party had goods for sale and at the buyer's request obtained the selling price. The evidence in the present case shows a sale, upon petitioner Fried's solicitation, of a number of stolen stereos by a business operated in part by her. This was enough to establish constructive possession.[*]

Petitioner Fried contends that under *United States* v. *Russo*, 123 F. 2d 420 (C.A. 3), it was improper to infer solely from her mere constructive possession of the stolen stereos that she knew the units were stolen. While inferences of guilty knowledge may be drawn from constructive as well as actual possession (see *Rugendorf* v. *United States*, 376 U.S. 528, 536-537; *United States* v. *Carnegella*, 198 F. 2d 3 (C.A. 7), certiorari denied, 344 U.S. 881), the finding of guilty knowledge in this case is not based solely on such an inference. As we have noted, the fact that petitioner Fried solicitated the sale at a low price and was associated with the other sales also supports a finding of guilty knowledge (see Pet. App. 3a).

Finally, petitioner Fried maintains that her conviction under 18 U.S.C. 659 cannot be sustained because

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[*] The cases cited by petitioner Fried (Pet. 13) involving the possession of narcotics concern individuals who were not directly associated with a sale or transfer of narcotics. Here, petitioner Fried was directly involved with the sale of the stereos.

Congress intended to preclude prosecutions of persons who knowingly possess stolen merchandise of a value less than $5,000. But the monetary limitation imposed by 18 U.S.C. 2315 is not applicable to a conviction under 18 U.S.C. 659. The gravamen of an offense under Section 659 is possession of property stolen from interstate or foreign commerce; the value of the property stolen is relevant only to a determination whether a crime is a felony. *Robinson* v. *United States*, 333 F. 2d 323, 326 (C.A. 8); *United States* v. *Gordon*, 253 F. 2d 177 (C.A. 7), reversed on other grounds, 344 U.S. 414; see also *United States* v. *Cousins*, *supra*, 427 F. 2d at 384-385.

3. The evidence established that co-defendant Schatten drove the truck that picked up the stereos from Pier 21 in Brooklyn. At trial, FBI agent Michael Downey testified that he arrested Schatten and questioned him concerning the theft. Agent Downey, when asked if Schatten had stated whether or not he knew petitioner Brach, stated "yes, he did." Petitioner's objection to this questioning was overruled (A. 535-538). Petitioner Brach now claims that the admission of this statement into evidence was improper under this Court's decision in *Bruton* v. *United States*, 391 U.S. 123. This contention was not advanced below and thus is not properly before the Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. Moreover, the rule of *Bruton*, that a co-defendant's statement incriminating the defendant cannot be introduced unless that co-defendant is available for cross-examination, was not violated here. Schatten's statement that he "knew" petitioner Brach was not incriminating since it did not

implicate Brach in the crime. The record establishes, by wholly independent evidence, that Brach was involved in the sale and possession of the stolen stereos, by reason of his participation in the delivery of a quantity of the units to Levy and his part in the management of the Fried company.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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